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Supreme Court of the United States

OCTOBER TERM, 1990

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,

v.

JOSEPH PATRICK DOHERTY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR *AMICI CURIAE* MEMBERS OF THE UNITED STATES SENATE AND MEMBERS OF THE UNITED STATES HOUSE OF REPRESENTATIVES IN SUPPORT OF RESPONDENT

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INTERESTS OF AMICI

Amici curiae, 132 Members of Congress, are a bipartisan group of legislators concerned with the proper interpretation of the immigration laws.[1] *Amici* have two vital concerns in this case: (1) ensuring respect for the balance of policy-making authority between the legislative and executive branches established by the Refugee Act of 1980; and (2) guaranteeing that respondent is afforded the basic protections of asylum law, including a full and fair hearing at which he may present evidence supporting his claim.

STATEMENT

Amici curiae address this brief to the important legal question whether Congress excluded foreign policy and political considerations from the Attorney General's discretion to grant asylum to refugees under Section 208 of the Refugee Act of 1980 ("Refugee Act"). *See* Immigration and Nationality Act ("INA") § 208, 8 U.S.C. § 1158 (1988).[2] The Attorney General denied respondent a hearing on his asylum claim, in part because of foreign policy concerns. *Amici* submit that sanctioning the Attorney General's use of discretion to advance transient foreign policy goals would frustrate the clear intent of

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[1] Individual *amici* are listed beginning on the inside front cover. Both petitioner and respondent have consented to the filing of this brief *amici curiae*. The letters of consent are on file with the clerk.

[2] Section 208(a) provides that "[t]he Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title." A "refugee" under INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A), is defined as "any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . ."

Congress to create an ideologically neutral and humanitarian asylum program.

Respondent Joseph Patrick Doherty was arrested in 1983 by the Immigration and Naturalization Service ("INS") and subsequently imprisoned without bond. In the intervening eight years, the repeated attempts of the executive branch to return respondent to the United Kingdom—and respondent's efforts to resist return—have been the subject of extended litigation before both administrative and judicial tribunals. *See Doherty v. United States Dep't of Justice*, 908 F.2d 1108, 1110-15 (2d Cir. 1990) (detailing proceedings), *cert. granted*, 111 S. Ct. 950 (1991).

This appeal arises from the enactment during the course of the immigration proceedings of new legislation in the Republic of Ireland affecting extradition standards. As permitted by statute, *see* INA § 243(a), 8 U.S.C. § 1253(a), Doherty initially had designated the Republic of Ireland as his country of deportation. The changes in Irish law would have required Doherty's immediate extradition from Ireland to the United Kingdom. *See* Joint Appendix 99-108. As a consequence of this significant shift in substantive law, and as permitted by regulation (*see* 8 C.F.R. § 3.2 (1990)), Doherty filed a motion to reopen his deportation proceeding, seeking a hearing on his application for asylum and withholding of deportation. The Board of Immigration Appeals ("BIA") granted the motion to reopen. It held that the intervening change in legal norms violated Doherty's legitimate expectations about the country of deportation and provided a reasonable excuse for the fact that he did not apply for asylum at his deportation hearing. Petitioner's Appendix ("Pet. App.") at 140a-141a.

In an unprecedented decision,[3] the Attorney General reversed the decision of the BIA. He held, in relevant

[3] The Attorney General reviewed Doherty's case on a request for certification by the INS. *See* 8 C.F.R. § 3.1(h)(iii) (1990). In the past 20 years, the Attorney General has published less than a dozen

part, that Doherty could be denied a hearing because he was not entitled to asylum as a matter of discretion. The Attorney General relied on the following factors to support that conclusion: (i) "it is 'the policy of the United States that those who commit acts of violence against a democratic state should receive prompt and lawful punishment'" (quoting *Matter of Doherty*, Mem. Att'y Gen. at 7 (June 9, 1988)); and (ii) "it is in the foreign policy interests of this country that respondent be deported to the United Kingdom."[4] Pet. App. at 82a.

The United States Court of Appeals for the Second Circuit reversed the Attorney General's decision and remanded the case for a hearing on Doherty's request for asylum. Judge Pratt, joined by Judge Feinberg, reasoned that Congress had narrowed the discretion granted to the Attorney General under Section 208 to *exclude* foreign policy considerations. *See Doherty*, 908 F.2d at 1120. The Court therefore concluded that, by relying on foreign policy implications to deny Doherty a hearing on his asylum claim, the Attorney General had abused his discretion.

In concluding that Section 208 prohibits the Attorney General from considering foreign policy or other political

decisions involving certification review. In each instance, the Attorney General limited review to legal questions and did not disturb the Board's factual findings. *See Matter of Leon-Orosco and Rodriguez-Colas*, 19 I. & N. Dec. 136 (AG 1984); *Matter of Belenzo*, 17 I. & N. Dec. 374 (AG 1981); *Matter of Cantu*, 17 I. & N. Dec. 190 (AG 1978); *Matter of Blas*, 15 I. & N. Dec. 626 (AG 1976); *Matter of Stultz*, 15 I. & N. Dec. 362 (AG 1975); *Matter of Hernandez*, 14 I. & N. Dec. 608 (AG 1974); *Matter of Toscano-Rivas*, 14 I. & N. Dec. 523 (AG 1974); *Matter of Janati-Ataie*, 14 I. & N. Dec. 216 (AG 1972). In each case that required further factfinding, the Attorney General remanded the case back to the BIA.

[4] The Attorney General also justified the denial of a hearing to Doherty on the grounds that "respondent knowingly and intentionally waived his claim to asylum," and because Doherty's past actions and associations "suggest that he is not deserving of equitable relief." Pet. App. at 82a.

factors, the Second Circuit reviewed in detail the text, legislative history, and purpose of the Refugee Act and determined that:

1. The Refugee Act replaced the pre-existing ad hoc system of parole with a systematic procedure for adjudicating asylum claims that excluded foreign policy considerations. According to the Court, Congress signalled this intent "by linking eligibility for asylum to the politically neutral definition of 'refugee.'" *Id.* at 1119.

2. The legislative history of the Refugee Act revealed the unequivocal intent of Congress to remove foreign policy considerations from the asylum process. *See id.* at 1120 (citing both House and Senate Reports). Congress intended to conform domestic law to the ideologically neutral approach of the United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, 606 U.N.T.S. 267 (1967) ("U.N. Protocol"). Because the purpose of the Refugee Act was to bring domestic practice into line with the politically neutral aspirations of international law, the Second Circuit, citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987), reasoned that Congress would not have granted the Attorney General the discretion to frustrate that goal. Rather, the discretion delegated by Section 208 was designed only "to preserve some degree of flexibility in the administration of the asylum process . . . ." *Doherty*, 908 F.2d at 1120.

Judge Lumbard dissented. His analysis, in relevant part, relied heavily on the fact that the language of Section 208 contains no explicit textual limitations on discretion. *See id.* at 1126. Based on this premise, he concluded that Congress' removal of ideological and geographical considerations from the refugee definition had no discernable implications for the Attorney General's discretion under the Refugee Act. Judge Lumbard further relied on "a special reason for judicial restraint," that "political judgments [we]re at the heart of the [Attorney General's] decision. . . ." *Id.* at 1124. The dissent did not analyze in detail the legislative history or purpose of the Refugee Act.

SUMMARY OF ARGUMENT

The text, structure, purpose, and legislative history of the Refugee Act demonstrate that Congress excluded foreign policy and political considerations from the discretion of the Attorney General over asylum applications. To achieve that goal, Congress amended the Immigration and Nationality Act to remove ideological and geographic restrictions on refugee admissions and defined a "refugee" eligible for asylum in neutral, non-political terms. In contrast to prior legislation that extended eligibility for relief only to those fleeing communist or Middle Eastern regimes, the Refugee Act defines a refugee as any person who establishes a well-founded fear of persecution on account of political opinion or other enumerated factors. *See* INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A). In fundamentally altering asylum law to create a process exclusive of ideological and political considerations, Congress prohibited the Attorney General from resurrecting politically-based criteria through the exercise of his discretion. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 434-35 (1987) (finding that Congress removed ideological, political, and geographic considerations from refugee definition); *INS v. Stevic*, 467 U.S. 407, 427 (1984) (same).

The INS errs when it argues that, because the INA expressly permits foreign policy to be considered in establishing quotas for the overseas resettlement program, the Attorney General may consider that factor in individual asylum determinations. *See* INA § 207(e)(6), 8 U.S.C. § 1157(e)(6). The conscious omission of foreign policy from the text of Section 208 and its specific inclusion in Section 207(e)(6) reflect the determination of Congress to exclude foreign policy from the individual asylum process. Furthermore, Section 207 limits the Attorney General's consideration of foreign policy to the process of setting overall numerical limits on refugee admissions, a task the statute requires to be accomplished in consultation with Congress. Foreign policy considerations are nowhere made relevant to the in-

dividual admissions determinations under Section 207(b) that are more closely analogous to Section 208 decisions.

An examination of the purpose and legislative history of the Refugee Act reinforces the conclusion that the statute prohibits the executive from weighing foreign policy concerns in deciding asylum claims. In modifying existing law, Congress designed the Refugee Act to serve three important purposes relevant here. First, Congress explicitly conformed United States law to the nonideological approach of the United Nations Protocol, an approach steeped in humanitarian, not political, concerns. Second, Congress directed that applicants be treated fairly and uniformly and on the basis of the merits of each individual claim. Third, Congress reasserted its control over refugee policy by narrowing in several ways the authority of the Attorney General. Each of these motivations, all evident on the legislative record, is inconsistent with petitioner's claim of unfettered authority over asylum determinations; indeed, the consideration of foreign policy factors by the Attorney General would eviscerate the clear intent of Congress.

Finally, the INS asserts that the decision to deny a hearing on Doherty's asylum claim is entitled to deference under both general administrative law principles and the plenary power doctrine. Neither shields the Attorney General's decision from judicial review. The novel statutory interpretation advanced by the INS—a position never accepted by any court—is wholly inconsistent with the text and history of the Refugee Act and, therefore, is not entitled to deference. The INS' reliance on its historical prerogatives over immigration clashes with Congress' decision to eliminate foreign policy factors from individual asylum determinations.

ARGUMENT

Section 208 of the Refugee Act delegates "discretion" to the Attorney General to grant asylum to refugees. This grant of discretion, by itself, does not confer unbridled authority. Limits on such discretion are properly derived from the text, structure, and legislative history of the statute. In this case, Congress specifically amended the immigration laws to create a politically-neutral asylum regime that conforms to the nonideological aspirations of international law; Congress could not have intended, at the same time, to cede back to the Attorney General the uncontrolled discretion to frustrate the fundamental purpose of the Refugee Act.

I. THE TEXT AND STRUCTURE OF THE REFUGEE ACT REFLECT CONGRESSIONAL INTENT TO EXCLUDE FOREIGN POLICY AND POLITICAL CONSIDERATIONS FROM THE ATTORNEY GENERAL'S DISCRETION UNDER SECTION 208

The text and structure of the Refugee Act make clear that foreign policy and political considerations may not properly influence the Attorney General's asylum determinations. The Refugee Act enunciated several fundamental principles that govern its implementation and interpretation.

First, Section 208(a) specifically provides for individualized decisionmaking;[5] the Refugee Act mandates the adjudication of asylum claims on the basis of an administrative record and individual merit. The emphasis on individualized assessment reflects the personal —and humanitarian—roots of the Refugee Act and suggests that reliance on broad policy goals separate and apart from the applicant's claim of persecution (and

[5] "The Attorney General *shall* establish a procedure for an alien physically present in the United States . . . to apply for asylum . . . ." INA § 208(a), 8 U.S.C. § 1158(a) (emphasis added).

beyond the capability of the refugee to assess and rebut) is inconsistent with the Refugee Act.[6]

Second, and most important, the Refugee Act marked a fundamental shift from prior refugee regimes that limited eligibility for relief to those fleeing communist or Middle Eastern countries.[7] Eligibility for asylum under the Act is determined under an ideologically neutral and apolitical standard: a refugee is defined as a person who is outside his country and unable to return "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . ." INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A). The shift from a politically-driven refugee regime to a system defined by ideological neutrality constituted the most significant policy innovation of the Refugee Act and signalled a reorientation of refugee law towards humani-

[6] The INS relies heavily upon *Jay v. Boyd*, a 5-4 decision in which the Court permitted the INS to deny suspension of deportation based on "confidential information" not disclosed to the alien. 351 U.S. 345, 349-50 & n.6 (1956). The Court characterized the discretion to suspend deportation under Section 244(a) of the INA as "unfettered." *Id.* at 354. It based this description on the fact that Congress did "not restrict the considerations which may be relied upon or the procedure by which the discretion should be exercised." *Id.* In *Wong Wing Hang v. INS*, 360 F.2d 715, 718 (2d Cir. 1966), Judge Friendly discussed the precise language relied on by the INS and emphasized that it did not preclude the federal courts from ensuring that, when exercising discretion, the agency acted consistently with congressional intent. As described in this brief, the Refugee Act supplies a quite different statutory backdrop than that surrounding the INA's suspension provision and one that mandates a different conclusion on the scope of discretion.

[7] INA § 203(a)(7)(A)(i), 8 U.S.C. § 1153(a)(7)(A)(i) (1976) (repealed 1980), permitted "conditional entry status" and provided for admission and permanent residence for certain persons fleeing persecution from communist or Middle Eastern countries, as well as persons fleeing a "natural calamity" declared by the President. *See Stevic*, 467 U.S. at 415. The Refugee Act removed this provision from the INA. Refugee Act § 203(b).

tarian principles and away from partisan political influences.[8]

Petitioner contends, however, that the politically-neutral definition of refugee applies only to eligibility for asylum but does not limit in any respect the discretion to deny asylum to an otherwise eligible person. *See* Pet. Br. at 25.[9] Such a contention is wholly inconsistent with the structural limitations at the foundation of the Refugee Act.[10] Carried to its logical conclusion, the rule offered by petitioner would empower the Attorney General unilaterally to deport entire classes of refugees on the ground that the recognition of persecution might adversely affect the relations of the United States with a friendly nation.[11] The Attorney General could, under this theory

[8] *See* Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. Pa. L. Rev. 1247, 1262 n.39 (1990) ("Congress intended the refugee standards to be applied neutrally and without ideological bias") (citations omitted).

[9] The Attorney General, along with the INS and the Department of State, has admitted that "the fact that an individual is from a country whose government the United States supports or with which it has favorable relations is *not* relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution." *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796, 799 (N.D. Cal. 1991) (emphasis added) (settling class action challenging INS treatment of Salvadoran and Guatemalan asylum-seekers and allowing any who had been denied relief to have claim reconsidered). Despite that admission, the INS now attempts to reintroduce foreign policy considerations in through the back door.

[10] Indeed, the regulations promulgated by the Attorney General list several factors that may be weighed in exercising a discretionary asylum decision; foreign policy is not among them. *See* 8 C.F.R. § 208.14(c) (1990). Nor has the BIA ever ruled that foreign policy is a relevant factor. *See* note 43 *infra*.

[11] Many commentators have observed that even after the passage of the Refugee Act the Attorney General and his delegates continue to enforce a *sub silentio* pattern of political discrimination in refugee decisions. *See, e.g.*, N. Zucker & N. Zucker, *The Guarded Gate: The Reality of American Refugee Policy* 140-76 (1987); Johnson, *A "Hard Look" at the Executive Branch's Asylum Deci-*

of unbridled discretion, deny the asylum claims of all Salvadorans while granting the claims of all Iraqis, depending upon the current foreign policy agenda. The interpretation advanced by the INS requires the anomalous conclusion that Congress fundamentally restructured the immigration laws to broaden the pool of eligible applicants to all refugees regardless of country of origin and at the same time granted the Attorney General the authority to pursue the exact same foreign-policy oriented practices in effect before amendment. Such a warped interpretation of the Refugee Act would undermine the ideologically and geographically neutral definition of refugee, vitiate the congressional mandate to decide asylum claims on an individual basis, and effectively

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sions, 1991 Utah L. Rev. —— (forthcoming June 1991); Schuck, *The Emerging Political Consensus on Immigration Law*, 5 Geo. Immigr. L.J. 1, 7 (1991); Kurzban, *A Critical Analysis of Refugee Law*, 36 U. Miami L. Rev. 865 (1982); Note, *Political Bias in United States Refugee Policy Since the Refugee Act of 1980*, 1 Geo. Immigr. L.J. 495 (1986). The General Accounting Office reported in 1987 that persons who flee communist or otherwise unfriendly countries are still granted asylum with much greater frequency than those from authoritarian regimes allied with the United States. *See* United States General Accounting Office, *Asylum: Uniform Application of Standards Uncertain—Few Applicants Deported* 22, 42 (1987); *see also* Anker, *Determining Asylum Claims in the United States: Summary Report of an Empirical Study of the Adjudication of Asylum Claims Before the Immigration Court*, 2 Int'l J. Refugee L. 252, 255 (1990) (concluding that "ideological . . . and . . . political judgements continue to influence the decision-making process"); *Melendez v. United States Dep't of Justice*, 926 F.2d 211, 219-20 (2d Cir. 1991) (reversing denial of asylum and suggesting that unstated foreign policy considerations tainted asylum decision on Salvadoran refugee).

Congress, in enacting the Refugee Act, was acutely aware of the hardships imposed by the existing geographical and ideological limits. For instance, refugees fleeing the despotic Duvalier regime in Haiti were ineligible for relief under the INA. *See* 125 Cong. Rec. H11973-78 (Dec. 13, 1979) (remarks of Rep. Chisholm). The position of the INS, carried to its logical conclusion, would vest the Attorney General with the untrammeled authority to abandon these refugees in the name of political expediency.

read out of the Act all of the carefully crafted provisions that limit executive discretion. At bottom, the denial of even a hearing on Doherty's asylum claim—a decision that ultimately rests on transient foreign policy goals declared by the executive branch—is at odds with the structure and promise of the Refugee Act. Nothing in the text of Section 208 permits, much less compels, such an outcome.

The INS also argues that because Congress referred to foreign policy in Section 207(e)(6), 8 U.S.C. § 1157(e)(6), it necessarily follows that the executive may properly consider foreign policy in the exercise of discretion under Section 208. *See* Pet. Br. at 25-27. This argument is incorrect. Section 207 requires the President, when consulting with Congress on the quota and allocation provisions of the overseas admissions program, to provide information on how admissions will affect "the foreign policy interests of the United States." INA § 207(e)(6), 8 U.S.C. § 1157(e)(6); *see Cardoza-Fonseca*, 480 U.S. at 433 (distinguishing Sections 207 and 208). Congress, in the very next section of the same statute, which governs "the process by which refugees currently in the United States may be granted asylum," 480 U.S. at 433, did not include foreign policy as a factor properly considered in the disposition of individual asylum claims. The inclusion of foreign policy considerations in Section 207 and its conscious omission from Section 208 reflect the significant differences between the setting of broad quotas in direct consultation with Congress and the notions of personal fairness implicated in the adjudication of individual claims.[12] "'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and

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[12] *See* Anker, *Discretionary Asylum: A Protection Remedy for Refugees Under the Refugee Act of 1980*, 28 Va. J. Int'l L. 1, 40 (1987) ("[Section 207] serves the larger requirements of U.S. policy; [Section 208] responds to the immediate needs of individuals").

purposely in the disparate inclusion or exclusion.'" *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)); *see Cardoza-Fonseca*, 480 U.S. at 432 (quoting *Russello*).

Moreover, the INS misreads Section 207. Section 207 provides that, in making complex determinations regarding the establishment of numerical limits for the annual admission of refugees, the executive may consider a number of different factors, including those related to the "national interest." *See* INA § 207(a)(1), 8 U.S.C. § 1157(a)(1). In contrast, decisions to admit individual refugees within this allocative framework are governed solely by the statutory definition of refugee in Section 101(a)(42) and by whether the refugee is of "special humanitarian concern to the United States. . . ." INA § 207(c)(1), 8 U.S.C. § 1157(c)(1). By providing humanitarian (rather than national interest) concerns as the guiding principle for individual refugee admissions under Section 207, Congress effectively excluded broad political considerations from *individual* refugee determinations.[13] These individual determinations—and not the setting of numerical limits—are most closely analogous to asylum determinations under Section 208.[14]

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[13] Thus, the INS misreads Section 207(c) when it baldly states that Doherty, if he were overseas, could have been denied admission solely on the basis of political undesirability. Pet. Br. at 21.

[14] In a similar manner, petitioner repeatedly suggests that, because the Second Circuit affirmed Attorney General Meese's foreign-policy based decision not to deport Doherty to Ireland under Section 243(a), its conclusion that foreign policy is an impermissible consideration under Section 208 is untenable. *See* Pet. Br. at 22. That argument ignores the significant textual differences between Sections 243(a) and 208. Section 243(a), 8 U.S.C. § 1253(a), expressly provides that an alien shall be deported to the country that he or she designates "unless the Attorney General, in his discretion, concludes that deportation to such country *would be prejudicial to the interests of the United States.*" (Emphasis added.) -Section 208, however, includes no comparable provision.

At bottom, the INS is left to argue that the absence of any specific textual limitation means that the Attorney General's discretion is unfettered and unreviewable by the judiciary. But its argument misconceives the nature of the inquiry; this Court has always looked to the structure and text of the entire statute for guidance as to the meaning of a particular provision. *See, e.g., United Savings Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) ("[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law").[15] In this case, the Refugee Act, considered as a whole, effectively prohibits the Attorney General from weighing foreign policy and political considerations in asylum decisions because they are "'considerations that Congress could not have intended to make relevant.'" *Wong Wing Hang v. INS*, 360 F.2d 715, 719 (2d Cir. 1966) (Friendly, J.) (quoting *United States ex rel. Kaloudis v. Shaughnessy*, 180 F.2d 489, 491 (2d Cir. 1950) (L. Hand, J.)); *see Cardoza-Fonseca*, 480 U.S at 449 (acknowledging "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien") (citations omitted).[16]

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[15] *See also International Primate Protection League v. Administrators of Tulane Educ. Fund*, 59 U.S.L.W. 4424, 4426 (U.S. May 20, 1991) ("'We continue to recognize that context is important in the quest for [a] word's meaning,' . . . and that '[s]tatutory construction . . . is a holistic endeavor'") (citation omitted); *West Virginia Univ. Hosps., Inc. v. Casey*, 111 S. Ct. 1138, 1148 (1991) ("Where a statutory term presented to us for the first time is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law") (citation omitted).

[16] *See also Jean v. Nelson*, 472 U.S. 846, 855-57 (1985) (holding that the discretion to parole aliens into the country excludes discrimination on the basis of race or national origin); L. Jaffe, *Judicial Control of Administrative Action* 181-82 (1965) (reviewing court must ensure that only "relevant factors" are considered by agency and that "legally irrelevant or forbidden considerations have

Finally, the INS protests that the rule articulated by the Second Circuit would strip the Attorney General of virtually all discretion, and it characterizes the choice for this Court as between a hamstrung Attorney General and a system of "unfettered" discretion.[17] Pet. Br. at 23, 33. But the INS poses a false dichotomy. In granting discretionary authority to the executive branch, Congress faced a spectrum of choice between mandatory relief and unreviewable discretion.[18] In the asylum context, Congress delegated substantial authority to the Attorney General, imposing only the reasonable—and perfectly foreseeable—requirement that he exercise this discretion in a manner

[not] determined the decision"); *cf.* Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747, 757 (1982) (appellate court reviewing trial court exercise of discretion should strive "to eliminate or curtail decisions based on impermissible factors") (footnote omitted).

[17] *Amici* do not, and need not, attempt to delineate the various factors the Attorney General may properly weigh in exercising his discretion to grant or deny the asylum claim of a *bona fide* refugee. Many factors consistent with the purposes of the Refugee Act might well be appropriate for consideration. However, the only factor presented here—the role of foreign policy—cannot be properly considered consistent with the statute.

[18] The INS argues that the decision of the Second Circuit is inconsistent with this Court's opinions that have described Section 208 as a discretionary remedy. Pet. Br. at 23-26 (citing *Cardoza-Fonseca*, 480 U.S. at 441, and *Stevic*, 467 U.S. at 423). There is no dispute on this issue; Congress did grant discretion to the Attorney General to decide asylum claims. The only question here, a question left open by *Cardoza-Fonseca* and *Stevic*, concerns the scope of that discretion.

The INS also urges that the holding of the Second Circuit is inconsistent with *Cardoza-Fonseca* because it makes asylum a more readily-available remedy than withholding of deportation. This theory turns on the unstated and misguided assumption that the exclusion of foreign policy and political considerations from Section 208 eliminates all discretion. Congress, however, granted significant discretion to the Attorney General, but instructed him to exercise that discretion in a fashion consistent with the purposes of the Refugee Act. The Attorney General failed to do so in this case.

consistent with the structure and goals of the Refugee Act.[19]

II. THE LEGISLATIVE HISTORY OF THE REFUGEE ACT DEMONSTRATES THAT CONGRESS INTENDED FOR ASYLUM CLAIMS TO BE ADJUDICATED ON A NONPOLITICAL BASIS.

In addition to the text and structure of the Refugee Act, its legislative history offers strong support for the conclusion that the Attorney General may not consider foreign policy in making asylum decisions. *See Cardoza-Fonseca*, 480 U.S. at 432-43 (interpreting Refugee Act in light of its legislative history); *Stevic*, 467 U.S. at 421-29 (same). When Congress enacted the Refugee Act, it sought to end the era of ad hoc and politicized asylum policy and to create a neutral and nonideological regime.[20] The legislative history reflects this intent.

Before World War II, Congress had never passed legislation providing for the admission or protection of persons fleeing persecution.[21] In the wake of the uprooting of a significant portion of Europe's population and the United States' emergence as a world leader, Congress began to provide for admission of refugees into this country.[22] These measures were reactive, ad hoc, and largely insufficient to deal with the emerging global refugee crisis.[23]

[19] This interpretation is consistent with the analysis of the commentators who have considered the specific question. *See* Anker, 28 Va. J. Int'l L. at 55-56; Helton, *The Proper Role of Discretion in Political Asylum Determinations*, 22 San Diego L. Rev. 999, 1009-11 (1985).

[20] *See generally* G. Loescher & J. Scanlon, *Calculated Kindness: Refugees and America's Half-Open Door, 1945 to the Present* (1986).

[21] *See* T. Aleinikoff & D. Martin, *Immigration: Process and Policy* 50-53 (1985).

[22] *See* Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 9, 12-20 (1981).

[23] *See id.* at 17-19.

In response to the invasion of Hungary by the Soviet Union in 1956, the Attorney General began to rely on his "parole" authority under the Immigration and Nationality Act to admit large numbers of refugees into the country.[24] The parole power evolved into the primary mechanism for admission of refugees. It was exercised beyond the checks of either the judicial or legislative branches and in a manner consistent with Cold War politics—those who fled communist countries were generally paroled into the country while those who fled noncommunist countries rarely received comparable relief.[25] Congress, at least in some respects, also conceived of the refugee laws in ideological terms; in 1965, it enacted the conditional entry provisions of the INA that expressly limited relief to persons fleeing a communist or Middle Eastern country.[26]

Apart from these programs for the admission of refugees, the Attorney General also possessed the discretion to withhold the deportation of an alien to any country where he would be subject to persecution.[27] Before 1980, withholding of deportation under Section 243(h) was committed to the absolute discretion of the Attorney General, and he exercised this discretion only in the rarest of instances.[28]

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[24] INA § 212(d)(5), 8 U.S.C. § 1182(d)(5) (1952). The parole authority vested the Attorney General with the discretion to permit the entry of persons "temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest . . . ." INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A). The Refugee Act specifically limited the parole power to cases involving "compelling reasons." *See* INA § 212(d)(5)(B), 8 U.S.C. § 1182(d)(5)(B); *see also infra* at 24-25.

[25] *See* Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. Mich. J.L. Ref. 243, 246 (1984).

[26] *See* INA § 203(a)(7)(A)(i), 8 U.S.C. § 1153(a)(7)(A)(i) (1976) (repealed 1980).

[27] INA § 243(h), 8 U.S.C. § 1253(h) (1970) (amended 1980).

[28] *See* Anker, 28 Va. J. Int'l L. at 32 & n.160; Note, *Judicial Review of Administrative Stays of Deportation: Section 243(h) of the Immigration and Nationality Act of 1952*, 1976 Wash. U.L.Q. 59, 100 (1976).

In the late 1960s, a new development placed the executive's domination of refugee policy in question. In 1967, the United States formally acceded to the United Nations Protocol Relating to the Status of Refugees.[29] The U.N. Protocol defines a refugee in strictly nonideological terms and obligates signatory states to implement their respective refugee policies without regard to the politics of the applicant or his homeland.[30] Article 3 of the Protocol requires that each "Contracting State[] . . . apply the provisions of this Convention to refugees without discrimination as to race, religion or *country of origin*" (emphasis added).

Despite accession to the U.N. Protocol and its commitment to a refugee system divorced from ideological concerns, the executive branch persisted in its politically-motivated refugee practice. *See* Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. Mich. J.L. Ref. 243, 249-50 (1984). Regulations promulgated as late as 1974 afforded the INS complete discretion over refugee admissions and failed to articulate any standards for eligibility determinations. *See* 8 C.F.R. §§ 108.1, 108.2 (1976); *Stevic*, 467 U.S. at 420 n.13. The regulations thus permitted the executive branch to continue its practice of adjudicating claims for relief at least partially on the basis of prevailing foreign policy considerations.[31]

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[29] By ratifying the U.N. Protocol, the United States bound itself to Articles 2 through 34 of the 1951 United Nations Convention Relating to the Status of Refugees, 19 U.S.T. 6259, 189 U.N.T.S. 137.

[30] Article 33 of the U.N. Protocol further provides that "[n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

[31] *See* Note, 1 Geo. Immigr. L.J. at 500-11; Hansen, *Behind the Paper Curtain: Asylum Policy Versus Asylum Practice*, 7 N.Y.U. Rev. L. & Soc. Change 107, 123-25 (1978).

Throughout the 1970s, Congress expressed concern that the Attorney General was making discretionary refugee decisions in a manner inconsistent with the nonideological and humanitarian goals of the U.N. Protocol. *See Doherty*, 908 F.2d at 1118-19; Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 9, 20-30 (1981). Various legislative proposals were advanced to remedy the perceived defects in the law and to end the era of ad hoc, discretionary, and discriminatory decisionmaking. Anker & Posner, 19 San Diego L. Rev. at 20-30. None of these efforts bore fruit until 1980.

The Refugee Act of 1980 "radically revised U.S. refugee and asylum law and procedures" [32] and restored congressional leadership to the field. The Act affirmed "the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands, Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980), and articulated a "national policy of welcome to refugees." S. Rep. No. 256, 96th Cong., 1st Sess. 3 (1979). Rejecting previous refugee provisions as "outdated, unrealistic, and discriminatory," [33] the Refugee Act remodeled the Immigration and Nationality Act in several fundamental respects. The Refugee Act (1) rejected the politicization of refugee determinations as a "cold war relic" [34] and explicitly adopted the nonideological and humanitarian approach of the U.N. Protocol, (2) required the Attorney General to establish procedures to ensure that each asylum-seeker's claim would be adjudicated on its individual merits, and (3) circumscribed the discretion of the Attorney General over refugee and asylum decisions. Petitioner's contention that Congress intended to confer unfettered discretion is inconsistent with each of these principles.

[32] *Refugee Assistance: Hearings on H.R. 3915 Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 56 (1983) (statement of Elliott Abrams, Assistant Secretary, Bureau of Human Rights and Humanitarian Affairs, Department of State).

[33] *Refugee Act of 1979: Hearings Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 1 (1979) (statement of Rep. Holtzman, co-sponsor of the Refugee Act of 1979, H.R. 2816).

[34] *Id.*

First, the overriding purpose of the Refugee Act was to bring the United States into conformance with international legal principles of fairness and neutrality in the implementation of refugee and asylum policy. *See Cardoza-Fonseca*, 480 U.S. at 436 ("[i]f one thing is clear from . . . the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol") (citations omitted).[35] The U.N. Protocol defines refugee in strictly nonpolitical terms.[36] Recognition of refugee status under international law rests exclusively upon individual circumstances and not the foreign policies of signatory nations. The Convention, and the 1967 Protocol, explicitly accept the principle of nondiscrimination based on country of origin.[37] *See supra*

[35] *See also Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 551-52 (9th Cir. 1990); *Doherty*, 908 F.2d at 1119; *Yiu Sing Chun v. Sava*, 708 F.2d 869, 872 (2d Cir. 1983); *Stevic v. Sava*, 678 F.2d 401, 408 (2d Cir. 1982), *rev'd sub nom. INS v. Stevic*, 467 U.S. 407 (1984).

[36] *See* note 30 and accompanying text *supra*. "A person is a refugee within the meaning of the 1951 Convention as soon as he fulfills the criteria contained in the definition. . . . He does not become a refugee because of recognition, but is recognized because he is a refugee." Office of the United Nations High Commissioner for Refugees' *Handbook on Procedures and Criteria for Determining Refugees Status* ¶ 28 (1979). The UNHCR Handbook provides significant guidance to the meaning of the Protocol and, by implication, to the Refugee Act. *See Cardoza-Fonseca*, 480 U.S. at 439 n.22; *Matter of Frentescu*, 18 I. & N. Dec. 244 (BIA 1982).

[37] *See* Cox, *"Well-Founded Fear of Being Persecuted": The Sources and Application of a Criterion of Refugee Status*, 10 Brooklyn J. Int'l L. 333, 346-47 (1984). The *travaux preparatoires* (history of negotiations) reveal that the United States, in the early rounds of negotiations, advocated limiting the protections of the

at 17 (quoting U.N. Protocol). The principle of nondiscrimination was considered such a central part of the Convention that, unlike other provisions, signatories could not make a reservation to Article 3. *See* U.N. Protocol, Article 42. The concept of an ideologically neutral refugee policy thus stands at the core of international law.

The Conference Reports to the Refugee Act declared that the Committee drafted the asylum and refugee provisions with the "understanding that it is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol." S. Conf. Rep. No. 590, 96th Cong., 2d Sess. 20 (1980); H.R. Conf. Rep. No. 781, 96th Cong., 2d Sess. 20 (1980). Congress adopted the U.N. Protocol's definition of refugee and simultaneously eliminated existing provisions, including the geographical limitations and the open-ended parole authority, which were inconsistent with international norms. Numerous witnesses, and many Members of Congress, expressed the view that these changes in refugee and asylum law would end the intrusion of politics into refugee policy and make American law consistent with the humanitarian impulse of international rules.[38] This respect for the nondiscriminatory

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Convention to persons of particular nationalities. This position was rejected, and the United States ultimately acceded to the nondiscrimination viewpoint. *Id.*; *see also Restatement (Second) Foreign Relations Law of the United States* § 147 (1965) (concluding that the history of negotiations may be taken into account in interpreting international agreements).

[38] *See, e.g.*, 125 Cong. Rec. H11,973 (Dec. 13, 1979) (remarks of Rep. Chisholm) ("[r]efugees fleeing persecution regardless of the country they come from, on humanitarian considerations alone, should be equal in standing for entry into the United States"); 125 Cong. Rec. 23,240 (1979) (remarks of Sen. Boschwitz) ("[i]f our commitment to help desperate, homeless people is sincere, we must be willing to help all in need of assistance despite their ideologies or *countries or* [sic] *origin*") (emphasis added); 126 Cong. Rec. 4,501 (1980) (remarks of Rep. Rodino) ("one of the most important pieces of humanitarian legislation ever enacted by a U.S. Congress"); H.R. Rep. No. 608, 96th Cong., 1st Sess. 9 (1979)

purposes of the Refugee Act was equally reflected in the President's signing statement. *See* President Jimmy Carter's Signing Statement, 16 Weekly Comp. Pres. Doc. 503 (March 18, 1980) (the Refugee Act "establishes a new admissions policy that will permit fair and equitable treatment of refugees in the United States, regardless of their country of origin"). Contrary to the mechanistic interpretation of the INS, this rule of nondiscrimination forms the bedrock principle of the Refugee Act, and this basic concept informs the interpretation of all of its provisions.

Petitioner leans heavily upon the statement in the Senate report that "the substantive standard [for relief] is not changed," Pet. Br. at 29, and notes that the Court quoted this exact language in *Cardoza-Fonseca*, 480 U.S. at 435 n.16. But a close examination of the context of this statement does not support the INS' interpretation. The statement in the Senate Report, read

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(stating that definition of refugee "eliminates the geographical and ideological restrictions" in current law); 126 Cong. Rec. 4,499 (1980) (remarks of Rep. Holtzman) (the new definition of refugee "finally eliminates the geographical and ideological restrictions applicable to refugees"); 126 Cong. Rec. 4,507 (1980) (remarks of Rep. Chisholm) (refugee admissions would no longer be "tainted with ideological, geographical or racial or ethnic biases"); *see also Briefings on the Growing Refugee Problem—Implications for the International Organizations: Hearings Before the Subcomm. on International Organizations of the House Comm. on Foreign Affairs*, 96th Cong., 1st Sess. 21 (1979) (remarks of Dick Clark, United States Coordinator for Refugee Affairs and Ambassador-at-Large) (stating that the Refugee Act "would make all people—regardless of their ideology, regardless of their geography—eligible for" relief).

The comments of Senator DeConcini to Secretary of State Vance illustrate the frustration of Congress with the executive branch's practice of infusing foreign policy into refugee matters: "If you are a boat refugee from Cuba, INS automatically considers you a refugee. If you are a boat refugee from Baby Doc's Haiti, INS automatically considers you an illegal alien coming to the United States for economic purposes." *United States Refugee Problems: Hearings before the Senate Comm. on the Judiciary*, 96th Cong., 2d Sess. 14 (1980).

in context, refers only to the conditions for eligibility for asylum and not to the exercise of discretion in individual asylum cases. *See* S. Rep. No. 256, *supra*, at 9. Indeed, this Court cited the Senate Report statement to support the proposition that "Congress was told that the extant asylum procedure for refugees outside of the United States was acceptable under the Protocol, *except for the fact that it made various unacceptable geographic and political distinctions.*" *Cardoza-Fonseca*, 480 U.S. at 434-35 (emphasis added).[39] The principal substantive innovation of the Refugee Act affected the asylum eligibility criteria and, by necessary implication, the discretion of the Attorney General; the primary support for the INS' revisionist legislative history is thus inapplicable.[40]

Second, Congress directed the Attorney General to create "a new uniform asylum procedure" to govern administrative decisionmaking. S. Conf. Rep. No. 590, *supra*, at 20; H.R. Conf. Rep. No. 781, *supra*, at 20; *see* INA § 208, 8 U.S.C. § 1158; *Yiu Sing Shun v. Sava*, 708 F.2d 869, 872 (2d Cir. 1983) (quoting House Conference Report). In establishing uniform procedures, Congress directed that all asylum-seekers be treated evenhandedly, and that similarly-situated applicants be held to the same standard.[41] The legislative history reflects the con-

[39] *See also Stevic*, 467 U.S. at 427; Schuck, 5 Geo. Immigr. L. J. at 7; Martin, 138 U. Pa. L. Rev. at 1261-62; Aleinikoff, *Political Asylum in the Federal Republic of Germany and the Republic of France: Lessons for the United States*, 17 U. Mich. J. L. Ref. 183, 235 (1984).

[40] The INS also chides the Second Circuit for relying on statements in the legislative record relating to Section 207 of the Refugee Act in interpreting the scope of discretion under Section 208. Pet. Br. at 29-30. Curiously, on the very next page of its brief, the INS cites several legislative comments, all of which relate to Section 207(a). Pet. Br. at 31 nn.16 & 17.

[41] *See* Letter from Senator Kennedy to Secretary of State Vance (reprinted in S. Rep. No. 256, *supra*, at 2) (the United States must "establish a long range refugee policy—a policy which will treat all refugees fairly and assist all refugees equally").

sensus that asylum applicants should be judged fairly and in accordance with the humanitarian goals of the Refugee Act. *See, e.g.*, H.R. Rep. No. 608, *supra*, at 17-18. By requiring uniform procedures, Congress effectively instructed the Attorney General to evaluate each application for asylum on the merits of the individual claim of persecution and not by reference to foreign policy or political goals.

The decision of Congress to require adjudication of asylum claims on their individual merits reflects its recognition of the humanitarian and protective nature of asylum.[42] As this Court has emphasized, "[d]eportation is always a harsh measure; it is all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country." *Cardoza-Fonseca*, 480 U.S. at 449; *see also Reyes-Arias v. INS*, 866 F.2d 500, 504 (D.C. Cir. 1989) (Starr, J.) (describing asylum as the "most sensitive of human claims in the international community"). Consistent with this understanding of asylum, Congress created a system of adjudication based upon the merits of an individual's case, not upon the relations between the United States and the country of origin.[43] The practice of denying asylum claims on

[42] The Refugee Act "gives statutory meaning to our national commitment to human rights and humanitarian concerns . . . ." S. Rep. No. 256, *supra*, at 1. The INS, in its own brief, acknowledges the humanitarian foundations of the Act, describing Doherty as seeking "the special humanitarian relief of asylum." Pet. Br. at 19, 33.

[43] Indeed, until the Attorney General intervened in this case, the executive had adhered to this interpretation of the Refugee Act. In *Matter of Pula*, 19 I. & N. Dec. 467, 473-74 (BIA 1987), the BIA emphasized that the agency must weigh "the totality of the circumstances" and that, once an asylum applicant establishes a well-founded fear of persecution, "the discretionary factors should be carefully evaluated in light of the unusually harsh consequences which may befall an alien who has established a well-founded fear of persecution; the danger of persecution should generally outweigh all but the most egregious of adverse factors." Until this case,

grounds unrelated to their merits because of prevailing political or foreign policy goals is anathema to the humanitarian purpose behind the Refugee Act.

Third, the Refugee Act overhauled the respective roles of the executive and the legislative branches in refugee and asylum decisions. Besides adopting the rules of the U.N. Protocol and affording procedural protections to asylum-seekers, Congress made clear in several ways that the unrestricted executive control over refugee law that had evolved over several decades would be significantly curtailed. In particular, Congress mandated regular consultation between the executive and Congress, thereby routinizing congressional input into refugee policy.[44] *See* INA § 207, 8 U.S.C. § 1157; 125 Cong. Rec.

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discretionary denials have been limited to matters of administrative efficiency and fairness. *See Doherty*, 908 F.2d at 1120. These applicants typically abused the asylum process or had found safe haven in other countries. *Id.* at 1120-21; *see also* Anker, 28 Va. J. Int'l L. at 49-51 (arguing that alternative safe haven and danger to the community are relevant discretionary factors); Helton, *The Proper Role of Discretion in Political Asylum Determinations*, 22 San Diego L. Rev. 999 (1985). Since *Pula*, the BIA has denied few asylum claims on discretionary grounds. *See* Anker & Blum, *New Trends in Asylum Jurisprudence: The Aftermath of the U.S. Supreme Court Decision in INS v. Cardoza-Fonseca*, 1 Int'l J. Refugee L. 67, 70 (1989); *see also* Martin, 138 U. Pa. L. Rev. at 1265-66 (praising executive's limited denial of asylum on discretionary grounds).

[44] The Refugee Act requires annual consultation between the President and Congress on the refugee admission quotas. INA § 207(e), 8 U.S.C. § 1157(e). The President must submit a detailed report to Congress on the status of refugees throughout the world and a proposal for the admission of refugees into the United States. *See* INA § 207(d)(1), 8 U.S.C. § 1157(d)(1). After congressional hearings on the President's proposal, a joint plan for the admission of refugees from the various regions of the world is adopted. *See* INA §§ 207(a)(3), 207(d)(3), 8 U.S.C. §§ 1157(a)(3), 1157(d)(3)(A); *see also* Blum & Laurence, *Cold Winds from the North: An Analysis of Recent Shifts in North American Refugee Policy*, 16 N.Y.U. Rev. L. Soc. Change 55, 66 n.69 (1987-88). The President also must undertake appropriate consultation with Congress on any emergency refugee initiatives. *See* INA § 207(b), 8 U.S.C. § 1157(b).

S12,007 (Sept. 6, 1979) (statement of Sen. Robert Byrd) (Refugee Act "provides for the first time the statutory requirement that Congress be consulted before refugees are admitted, and defines and exerts congressional control over the process").

In addition, the Refugee Act transformed withholding of deportation from a completely discretionary to a mandatory form of relief in any instance in which the applicant establishes a clear probability of persecution. *See* INA § 243(h), 8 U.S.C. § 1253(h); *INS v. Stevic*, 467 U.S. 407, 421-25 (1984). This change brought the Refugee Act into conformity with international law[45] and further constricted the discretionary authority of the Attorney General.

Moreover, Congress virtually eliminated the broad power of the Attorney General to parole refugees into the country. The Refugee Act specifically limited the use of the parole authority to situations in which the Attorney General "determines that compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee" under Section 207. INA § 212(d)(5), 8 U.S.C. § 1182(d)(5). Thus, Congress further narrowed the discretion of the Attorney General and funnelled individual refugee determinations into a formal and uniform process.

Finally, the Refugee Act vested the Attorney General with discretion over asylum decisions but did so in a manner markedly different from the "sweeping delega-

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[45] *See* H.R. Rep. No. 608, *supra*, at 18 ("[a]s with the asylum provision, the Committee feels that the proposed change in section 243(h) is necessary so that U.S. statutory law clearly reflects our legal obligations under international agreements"); *see also* Anker & Posner, 19 San Diego L. Rev. at 45 (observing that amendment of § 243(h) represented a movement "towards consonance with the UN Convention").

tions"[46] found in other provisions of the INA. Congress gave the Attorney General authority to create a "*fair and workable* asylum policy which is consistent with this country's tradition of welcoming the oppressed of other nations and with our obligations under international law. . . ." H.R. Rep. No. 608, *supra*, at 17-18 (emphasis added).[47] Congress, acknowledging the difficulties of creating a "workable" policy, vested the Attorney General with discretion, but it required him to exercise his authority in harmony with the ideologically neutral and humanitarian impulses of the Refugee Act. The legislative determination to channel the Attorney General's authority further rebuts the INS' notion of unfettered discretion. *See* Anker & Posner, 19 San Diego L. Rev. at 36 (Refugee Act "structure[s] and control[s] executive decision making").

In light of the many steps taken by Congress to limit executive authority over refugee law, it is clear that the Attorney General's reliance on the "unfettered discretion" of Section 208 to deny Doherty a hearing for foreign policy reasons is inconsistent with fundamental tenets of the Refugee Act.

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[46] *See Jean v. Nelson*, 727 F.2d 957, 965-67 (11th Cir. 1984) (en banc), *aff'd*, 472 U.S. 846 (1985).

[47] *See, e.g., Admission of Refugees into the United States: Hearings Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 97 (1977) (statement of Rep. Eilberg) ("I am the first to recognize that we must preserve some degree of administrative flexibility in admitting refugees to this country, but at the same time Congress cannot shirk its responsibility to legislate orderly, consistent, and uniform procedures governing their admission"); Anker, *Discretionary Asylum: A Protection Remedy for Refugees Under the Refugee Act of 1980*, 28 Va. J. Int'l L. 1 (1987); Helton, *The Proper Role of Discretion in Political Asylum Determinations*, 22 San Diego L. Rev. 999 (1985); Roberts, *The Exercise of Administrative Discretion Under the Immigration Laws*, 13 San Diego L. Rev. 144, 145-48 (1975).

III. BECAUSE THE POSITION ASSERTED BY THE INS IS CONTRARY TO THE REFUGEE ACT, IT IS NOT ENTITLED TO DEFERENCE.

In its final attacks on the decision of the Second Circuit, the INS offers several reasons why this Court should defer to its reading of the Refugee Act. Its concerns are inapplicable here.

First, the INS suggests, as a general principle of administrative law, that the legal interpretations of the Attorney General are entitled to deference as a matter of course. Pet. Br. at 40. However, this Court consistently has required agencies to act in harmony with the mandate of Congress.[48] Deference to the interpretations of the Attorney General is particularly unwarranted here because the text and history of the Refugee Act evidence the unambiguous intent of Congress. In *Cardoza-Fonseca*, this Court rejected the executive's interpretation of the statute because it was contrary to clear congressional intent as determined by "traditional tools of statutory construction." 480 U.S. at 446. The Court emphasized that the judiciary remains the " 'final authority' " on statutory interpretation. *Id.* at 447 (citation omitted).[49] In this case, the petitioner's novel theory

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[48] *See Bureau of Alcohol, Tobacco & Firearms v. Federal Labor Relations Auth.*, 464 U.S. 89, 97 (1983) (emphasizing that courts should reverse " 'administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute' ") (citation omitted); *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (emphasizing that "agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider") (citation omitted).

[49] This Court has been reluctant to extend untoward deference to the INS in the immigration context. *See Cardoza-Fonseca*, 480 U.S. at 452 (Blackmun, J., concurring) ("[t]he efforts of [the lower courts in interpreting the statute] stand in stark contrast to—but, it is sad to say, alone cannot make up for—the years of seemingly purposeful blindness by the INS, which only now begins its task of developing the standard entrusted to its care").

is contrary to clear congressional intent and not entitled to deference.[50]

Second, petitioner argues, relying on *INS v. Abudu*, 485 U.S. 94 (1988), that the plenary power doctrine insulates its decisions from judicial review. Pet. Br. at 33-34. However, this Court traditionally has applied that doctrine to shield laws enacted by *Congress* in the immigration area from judicial scrutiny.[51] Indeed, Congress explicitly recognized in enacting the Refugee Act that it—not the executive—was exercising its plenary power over immigration. *See* 125 Cong. Rec. H11,967 (Dec. 13, 1979) (statement of Rep. Lott) ("[t]he committee was extremely concerned about assuring that Congress has a proper and substantial role in refugee admissions, given *our plenary power over immigration*") (emphasis added).

When the judiciary has deferred to the executive plenary power, it has done so only when Congress has not imposed statutory limitations on the executive branch. *See Abudu*, 485 U.S. at 110 (stating that "abuse-of-discretion standard will often apply to agency adjudications *not governed by specific statutory commands*") (em-

[50] The clear congressional intent distinguishes this case from the cases cited by petitioner in support of its deference theory. *See, e.g., Pension Benefit Guar. Corp. v. LTV Corp.*, 110 S. Ct. 2668, 2677 (1990) (holding that traditional tools of statutory construction failed to evince clear congressional intent and therefore court should defer to agency interpretation); *see also Homemakers North Shore, Inc. v. Bowen*, 832 F.2d 408, 411 (7th Cir. 1987) (Easterbrook, J.) (stating that when Congress establishes rule binding agency, agency interpretation "is entitled to . . . little force") (citations omitted).

[51] For instance, the seminal plenary power case involved judicial review of the Chinese Exclusion Act. *The Chinese Exclusion Case*, 130 U.S. 581 (1889). Virtually all of the cases cited by petitioner in its brief involve review of the decisions of Congress, not the executive, on immigration matters. *See Fiallo v. Bell*, 430 U.S. 787 (1977); *Galvan v. Press*, 347 U.S. 522 (1954); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

phasis added). Here, the Attorney General operates pursuant to a statute whose principal animating purpose was to reassert congressional control over standardless and wholly discretionary decisionmaking by the executive. *See supra* at 22-26.[52] The INS thus wrongly poses the conflict; it is not created by the judiciary's attempt to impose undue limits on the Attorney General but by the Attorney General's attempt to evade the permissible limits imposed by Congress. When the executive violates the mandate of Congress, the decisions of the Attorney General deserve no special deference.

Finally, the INS proffers one last deference argument, that respondent is a terrorist and that the judiciary should defer to the Attorney General's international cooperative efforts in that realm. Pet. Br. at 33. Petitioner, however, makes these assertions without affording Doherty an opportunity to rebut specific charges against him and present evidence at an asylum hearing. By denying Doherty the opportunity to be heard, the Attorney General has acted in disregard of the mandate of the Refugee Act and of the BIA rulings that compel careful fact-finding and the balancing of equities. *See Yiu Sing Chun v. Sava*, 708 F.2d at 876 (holding that "Congress's limitation on the Attorney General's discretion requires careful fact-finding"); *Matter of Riccio*, 15 I. & N. Dec. 548, 549 (BIA 1976) (holding that discretionary judgments must be based upon evaluation of all the facts and circumstances of particular case); *Matter of Vega*, 11

[52] The congressional goal of limiting executive authority in this area was made clear from the first hearings on the Refugee Act. *See* H.R. Rep. No. 608, *supra*, at 15 (quoting House hearings); *Admission of Refugees into the United States: Hearings Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 59 (1977) (statement of Rep. Eilberg) (introducing legislation representing "an attempt to restore [congressional] authority and, at the same time, to establish a proper balance between the executive and the legislative branches of Government in establishing the appropriate procedures. . . .").

I. & N. Dec. 337, 339 (BIA 1965) (same). The Attorney General's extraordinary decision to deny asylum without a full and fair hearing stands in stark contrast to the careful and individualized requirements spelled out in the Refugee Act.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Second Circuit should be affirmed.

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